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Supreme Court, U.S.
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No. 08- OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Barbara Hildenbrand
Gerald Stone
Petitioners, pro se

v.

United States of America
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Barbara Hildenbrand
and
Gerald Stone
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Petitioners

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QUESTIONS PRESENTED

1. Where there was no involvement of Federal funds does either the Spending Clause or the Necessary and Proper Clause of the U.S. Constitution empower Congress to apply 18 U.S.C. §§ 666 or 1012?

2. Does the Fifth Circuit's panel decision as to 18 U.S.C. § 666, in violation of its own strict *stares decisis* rules and in conflict with other Circuits as well as Supreme Court decisions, depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

3. Can a non-statutory program not receiving Federal funds, defined and operated by a nonprofit organization outside the federal government, be *in pari materia* with 18 U.S.C. § 1012, to resolve the unconstitutionally vague, indefinite and uncertain allegations of § 1012 taken alone?

4. Can the victim and restitution terms determined by a signed plea agreement tracking an indictment be unilaterally changed at sentencing?

5. Does the Fifth Circuit's panel decision violate the Rule of Lenity, where it expanded the reach of 18 U.S.C. §§ 666 and 1012 to include something other than federal funds, contrary to settled case law?

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The opinion of the Court of Appeals is reported at 527 F.3d 466, and is reprinted in the Appendix at pages A-1-20.

JURISDICTION

The Court of Appeals denied panel rehearing on June 16, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article I, § 8, clause 1 (The Spending Clause) provides in part: The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; ...

Article I, § 8, clause 18 (Necessary and Proper Clause) provides in part: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

STATUTES INVOLVED

This case involves provisions of 18 U.S.C. §§§ 666, 1012 and 1956(c)(7)(D), and 12 U.S.C. § 1710(g), pertinent parts of which are reprinted in the Appendix at pages A-23-25.

REGULATIONS INVOLVED

This case involves regulatory guidance from U.S. Department of Housing and Urban Development (HUD): Housing Notice 94-74, Mortgagee Letter 2001-30, and C.F.R. Part 291, pertinent parts of

which are reprinted in the Appendix at pages A-26-49.

STATEMENT OF THE CASE

Defendants were convicted in District Court by guilty plea to charges of Conspiracy to Commit Theft from an Organization in violation of 18 U.S.C. § 371 (§ 666) and tax evasion in violation of 26 U.S.C. § 7201 (Stone); and Defrauding HUD in violation of 18 U.S.C. § 1012 (Hildenbrand). Numerous and lengthy objections were filed to the Pre-Sentence Report, primarily around the issue that no Federal money was received by the organization to bring it under the protection of either 18 U.S.C. §§ 666 or 1012, none of which objections were addressed, either by the Probation Office or at sentencing. Defendants timely filed their notice of appeal, restating their arguments that no Federal funds were received by the organization, and that no "compensation, rebate, or reward" was received either by the organization or by its president (Hildenbrand). The opinion was issued May 13, 2008, affirming the convictions and dismissing Defendants' Third Point on Appeal, that the plea agreement had been effectively breached when the victim and the restitution amount, from both the indictment and plea agreement, were changed at sentencing. The panel opinion concluded that marketing discounts offered in sales contract agreements, in which the only money changing hands went from the organization to HUD, qualified both as federal assistance to the organization, within the meaning of 18 U.S.C. § 666, and also as a "reward" to the president of the organization, personally, within the meaning of 18 U.S.C. § 1012. Petitions for Panel Rehearing and En Banc Rehearing were denied June 16, 2008.

REASONS TO GRANT THE PETITION

1. *The Fifth Circuit failed to recognize that neither the Spending Clause nor the Necessary and Proper Clause of the U.S. Constitution empower Congress to apply 18 U.S.C. §§ 666 or 1012 to circumstances where there was no involvement of Federal funds.*

While the Necessary and Proper Clause has been cited in *Sabri v. United States*, 541 U.S. 600, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004), for the proposition that Congress has authority under the Spending Clause to appropriate *federal monies* to promote the general welfare, and therefore has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact *spent* for the general welfare, the Necessary and Proper Clause confers no power upon Congress other than that "which shall be necessary and proper for carrying into Execution the foregoing Powers" conferred upon Congress by the Spending Clause. If the Spending Clause does not implicate congressional control or oversight over the Defendants' conduct, neither §§ 666 nor 1012 can be constitutionally applied.

Therefore, while the Necessary and Proper Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" congressional powers under the Spending Clause, which include enactment of §§ 666 and 1012 to protect federal funds spent, the necessary

legal predicate for the jurisdiction of §§ 666 and 1012 over a defendant's conduct is "expenditure of public moneys for public purposes" within the limits of the Spending Clause.

> In *Sabri,* the Supreme Court readily found, ..., that § 666(a)(2)'s enactment was a valid exercise of Congress' Article I powers: Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, ... [*Sabri*] at 1948 (internal citations omitted).

United States v. Spano, 401 F.3d 837, 840 (7th Cir. 2005).

But without the authority under the Spending Clause to appropriate and spend federal monies to promote the general welfare, the Necessary and Proper Clause in and of itself is of no effect, and cannot provide the sole basis for enactment of §§ 666 or 1012 to reach conduct that does not implicate a threat to federal monies. The constitutional reach of §§ 666 and 1012 depends solely upon a valid federal interest arising under the Spending Clause where Congress has appropriated taxpayer dollars under that power to spend for the general welfare.

In *Spano*, the Seventh Circuit noted the Supreme Court's contrast of the Spending Clause' authorization of § 666 with the failure of the Commerce Clause's authorization of the statutes challenged in *United States v. Lopez*, 514 U.S. 549,

115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000):

> [t]he Court noted that the statutes at issue in *Lopez* and *Morrison* failed because of their clear lack of a direct connection to commerce or any sort of economic enterprise and because the nexus articulated by Congress—preservation of social prosperity and productivity—expanded Commerce Clause authority beyond limit. *Sabri* 124 S.Ct. at 1947. The Court distinguished § 666(a)(2) from the *Lopez* and *Morrison* statutes by finding a direct link between § 666(a)(2) and congressional spending power."

Spano at 841

> The power to keep a watchful eye on expenditures and on the reliability of those who use public money *is bound up with congressional authority to spend in the first place,* and Sabri would be hard pressed to claim, in the words of the *Lopez* court, that § 666(a)(2) "has nothing to do with" the congressional spending power.

Sabri, 124 S.Ct. at 1947 (emphasis added)

Section 666 makes its direct link between § 666 (a) and congressional spending power through § 666(b)'s requirement that the affected organization "receives, in any one year period, benefits in excess of $10,000 under a federal program involving a ... form of federal assistance." § 666(b). "It is certainly

enough that the statutes condition the offense on a *threshold amount of federal dollars* defining the federal interest ..." *Sabri*, 124 S.Ct. at 1946.

> In *Sabri*, the Supreme Court held that Congress had the authority under the Spending Clause, U.S. Const. Art. I, § 8, cl. 1, and the Necessary and Proper Clause, U.S. Const. Art. I, § 8, cl. 18, to ensure that corrupt officials are not charged with making decisions *about how taxpayer dollars are spent.*

United States v. Mirikitani, 380 F.3d 1223, 1225 (9th Cir. 2004). (emphasis added).

Based on this requirement of a federal interest arising under the Spending Clause before a federal criminal statute can reach the conduct of those accused of criminal behavior, the courts have repeatedly relied upon the expenditure of federal funds as a jurisdictional prerequisite for prosecution of criminal behavior under § 666. "In *Cabrera*, we set forth the requirements for a prosecution pursuant to § 666. ... the defendant must be an agent of a government agency receiving $10,000 or more in federal funding annually, ... Additionally, 'we held that the defrauded program or agency must receive federal funding directly...'" *United States v. Bynum*, 327 F.3d 986, 991 (9th Cir. 2003) (citing *United States v. Cabrera*, 328 F.3d 506, 509 (9th Cir. 2003, internal citations omitted). "The statute in this case, in contrast, is not intended to do anything except protect the integrity of federal funds. Where, as here, the institution receives no such funds, the statute need not and does not make stealing from that institution a federal crime." *United States v. Wyncoop*, 11 F.3d 119, 123 (9th Cir. 1993).

Every circuit addressing § 666 has relied upon the affected organization's having received federal funds as a prerequisite for subject matter jurisdiction to prosecution under § 666. "[B]ecause any misuse of funds covered by the statute ultimately affects the monies provided by the federal government". *Spano* at 841. "Section 666 of Title 18 of the United States Code prohibits acts of theft and fraud against organizations receiving federal funds under federal assistance programs." *Fischer v. United States*, 529 U.S. 667, 675, 146 L.Ed. 2d at 715, 120 S.Ct. 1780 (2000). "As this chronology and the statutory language demonstrate, § 666(a)(1)(B) was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds." *Salinas v. United States*, 552 U.S. 52, 58, 139 L.Ed.2d 352, 362, 118 S.Ct. 469 (1997). "[T]he statutory term 'agent' ... should be construed in the context of § 666 to tie the agency relationship to the authority that a defendant has with respect to control and expenditure of the funds of an entity that receives federal monies." *United States v. Phillips*, 219 F.3d 404, 415 (5th Cir. 2000). "The panel instead viewed Phillips as an agent of the Louisiana Tax Commission, which received no federal funds, and concluded that the statute did not reach his activity." *United States v. Lipscomb*, 299 F.3d 303, 313, 314 (5th Cir. 2002).

> Judge Wiener found the rational connection standard satisfied by two federal interests in criminal jurisdiction over corruption of the kind at bar. First was the absolute size of federal funds--$56 million—received by the City of

> Dallas. ... Second was the "integrity vel non of federal programs and funds".

Edgar at 1326 (internal citations omitted).

The Fifth Circuit in *Phillips* plainly settles the issue in the Fifth Circuit that the constitutional reach of § 666 depends solely upon the Spending Clause. "Congress' authority to enact § 666 rests on the Spending Clause of the Constitution." *Phillips* at 414.

In *United States v. Zwick*, 199 F.3d 672 (3d Cir. 1999), the Third Circuit defined the contours of the constitutional application of Section 666 by the implication of a federal interest by the defendant's offense conduct. *Zwick* at 687. "The Senate Report's examples of intended § 666 offenses involved situations in which the corrupt acts clearly implicated a federal interest, as the acts were closely tied to the funded programs." *Id* at 685. But

> nothing in the legislative history suggests that Congress intended to go well beyond the samples in *Del Toro, Hinton,* and *Mosely* to make § 666 applicable when no federal interest is implicated by certain offense conduct. Not only does the legislative history of § 666 lead us to conclude that the statute be read to incorporate a federal interest requirement, but several well-established principles of statutory construction dictate this result.

Id at 686.

In *Sabri v. United States*, 541 U.S. 600, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004), the Supreme Court identified the "federal interest" § 666 was designed to protect which previous federal legislation had failed to achieve. "The design was generally to

'protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery,' *S.Rep.No. 98-225,* p.370 (1983), in contrast to prior federal law affording only two limited opportunities to prosecute such threats to the federal interest". *Sabri,* 541 U.S. at 606, 124 S.Ct. at 1946. "Congress' decision to enact § 666 only after other legislation had failed to protect federal interests is further indication that it was acting within the ambit of the Necessary and Proper Clause." *Sabri,* 541 U.S. at 607, 124 S.Ct. at 1947.

> Interpreting § 666 to have no federal interest requirement produces serious concerns as to whether Congress exceeded its power under the Spending Clause in enacting this statute. To pass muster under the Spending Clause, legislation regulating behavior of entities *receiving federal funds* must, among other things, be based upon a federal interest in the particular conduct. Applying § 666 to offense conduct, absent evidence of any federal interest, would appear to be an unconstitutional exercise of power under the Spending Clause.

Zwick at 687 (emphasis added).

"Thus, we hold that § 666 requires that the government prove a federal interest is implicated by the defendant's offense conduct." *Id.* While the Supreme Court in *Sabri,* 541 U.S. at 604, 124 S.Ct. at 1945, identified *Zwick* as a decision which established a "nexus requirement" for proof of a connection between forbidden conduct and federal funds, which *Sabri* overruled, *Zwick* itself suggested

that a federal interest could be proven by the receipt of federal funds required by § 666(b).

> We can conceive of several ways in which the government could prove a *federal interest* in a § 666 case in light of this threshold. The amount of federal funds could provide the requisite federal implication, even if the purpose of those funds has no explicit relationship to the subject of the bribe.

Zwick at 687.

Zwick, which is considered to have been overruled by *Sabri*'s holding that the constitutionality of § 666 did not implicate a nexus requirement, suggested that a threshold amount of federal funding could prove the requisite implication of a federal interest and was upheld by the Supreme Court in *Sabri*. "It is certainly enough that the statutes condition the offense on a *threshold amount of federal dollars defining the federal interest*, such as that provided here." *Sabri*, 541 U.S. at 606, 124 S.Ct. at 1946.

This identification of a "federal interest" requirement in terms of expenditure of federal funds in order "to pass muster under the Spending Clause" was merely a recognition of what had been identified previously in Westmoreland, Wyncoop and other circuit decisions. "... the statute limits its reach to entities that receive a substantial amount of federal funds..." *Westmoreland* at 578. The Third Circuit's analysis in *Wyncoop* identified federal funding as the source of federal criminal jurisdiction for prosecution under § 666.

"After a review of the statute itself, its history, and its interpretation in this and other federal courts, we conclude that Congress' intent was to

bring conduct that could have an effect on the administration or integrity of federal funds within the ambit of federal criminal law." *Wyncoop*, 11 F.3d at 121. "We stressed in *Simas* that when Congress enacted section 666, it intended to 'protect federal funds by preserving the integrity of the entities that *receive federal funds* rather than requiring the tracing of federal funds to a particular illegal transaction.' 937 F.2d at 463." *Wyncoop* at 122. While a nexus connection was unimportant, protecting the federal funds received by an entity was the "federal interest" behind the congressional purpose for enactment of § 666.

The Supreme Court's final words on the subject of federal criminal jurisdiction under § 666 in Part II of *Sabri* stated, "Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert *public spending* into unearned private gain, ..." *Sabri*, 541 U.S. at 608, 124 S.Ct. at 1947 (emphasis added). Congressional power to enact § 666 so as to reach the conduct of those who unlawfully affect the "expenditure of public moneys for public purposes", comes from the Spending Clause of the U.S. Constitution, Art. I, § 8, cl. 1.

Likewise in 18 U.S.C. § 1012, the reach of unnumbered paragraph two depends solely upon the Spending Clause of the U.S. Constitution. § 1012 protects the Department of Housing and Urban Development (HUD)'s expenditures of federal funds by punishing those who "receive any compensation, rebate, or reward, with intent to defraud HUD or with intent to unlawfully defeat its purposes". § 1012. Only by making a direct link between federal spending in the form of "compensation, rebate or reward" with conduct of either (a) intent to defraud HUD, or (b) intent to unlawfully defeat HUD's

purposes, was Congress able to bring these two unlawful types of conduct within the criminal jurisdiction of the federal government, by way of the Spending Clause.

In order for § 1012 to reach the unlawful activity identified in unnumbered paragraph two, there had to be an expenditure of federal funds under the Spending Clause. *Phillips* provides an analog for analysis of federal criminal jurisdiction reached under the Spending Clause. "Congress' authority to enact § 666 rests on the Spending Clause of the Constitution." *Phillips* at 414. "Without an agency relationship to the recipient of federal funds, § 666 does not reach the misconduct of local officials." *Phillips* at 413. Congressional power to enact legislation to protect federal monies and ensure the proper use of federal funds, like its well-recognized ability to impose conditions on the use of federal funds by those who receive them, flows from the Spending Clause. "In addition to Congress' broad power to spend for the general welfare, its ability to impose conditions on the receipt of federal funds is also unquestioned." *State of Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981). "The courts have long recognized the legitimacy of Congress' interest in ensuring the proper use of federal funds and have upheld a variety of terms attached to federal grant programs for that purpose." *State of Oklahoma*, at 417. "The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place." *Sabri*, 124 S.Ct. at 1947.

Without some expenditure of federal funds, there is no power under the Spending Clause to regulate the conduct enumerated in unnumbered paragraph

two of § 1012. This is why this paragraph of § 1012 is conditioned upon the receipt of "any compensation, rebate, or reward". The federal government, or HUD, must provide federal monies in the form of a "compensation, rebate, or reward" to an individual before that person's conduct falls within the reach of federal jurisdiction to criminally prosecute an offense under § 1012. This can be illustrated by the district court's holding in *United States v. Purcell*, 360 F.Supp. 1074 (D.C. Idaho, 1973).

In *Purcell*, the defendant, while receiving financial assistance from HUD in the form of payments to her mortgage company, rented out her property to another, keeping the rent payments for herself. The financial assistance from HUD had been conditioned upon her continued occupancy of the property. It was alleged in the indictment that she "did knowingly and with intent to defraud [HUD], receive certain compensation in money," *Purcell* at 1075, alleging a violation of 18 U.S.C. § 1012, unnumbered paragraph two ("subsection two").

Purcell stands for the proposition that § 1012 is not unconstitutionally vague, indefinite and uncertain in violation of the Fifth Amendment when it is read and construed together with applicable HUD statutes or regulations that are *in pari materia* with it. Because of "the nature and varied functions and purposes of" HUD, it would be almost impossible for § 1012 to "define what the purposes of HUD are or specifically refer one to where they can be ascertained". *Purcell* at 1077. "It is a canon on construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." Black's Law Dictionary, Eighth Edition, Page 807. Therefore,

any vagueness, indefiniteness or uncertainty in § 1012 about what HUD purposes are protected from being defeated may be resolved by referring to HUD statutes and regulations that define, state and set forth HUD's purposes under its various programs. But some statute or regulation that is *in pari materia* with § 1012 must be identified to meet

> the general constitutional standard that a criminal statute must be sufficiently definite so as to fairly inform a person of ordinary intelligence of the type of conduct the statute is designed to prohibit. *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed.367 (1952); *United States v. Harris*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *Jordan v. DeGeorge*, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951).

Purcell at 1076-77.

In *Purcell*, the indictment met this general constitutional standard by specifically identifying § 235 of the National Housing Act, embodied in 12 U.S.C. § 1715z, which, being *in pari materia* with § 1012, could be read and construed with § 1012, and thus provided notice to the defendant that the applicable standard of guilt was whether her receipt of federal funds, in the form of compensation by the direct payment of her mortgage, in violation of the condition of her continued occupancy of the property thus paid for by HUD, was done with either (a) intent to defraud HUD, or (b) intent to defeat HUD's purposes of providing "aid to low income families in securing adequate housing by paying a portion of the family's mortgage payments on the home" by her misdirecting federal funds appropriated for that

purpose to herself when she did not meet the requirements for such assistance.

Besides resolving any unconstitutional vagueness, indefiniteness, or uncertainty in § 1012 and providing notice to the accused, Purcell, of the applicable standard of guilt to be applied to her alleged offense, the construction together of the *in pari materia* statutes, §§ 1012 and 1715z, identified in Purcell's indictment, provided the link to congressional spending power under the Spending Clause that § 1012 does not do alone. "Subsection two" states "Whoever receives any compensation, rebate, or reward, ..." without specifically identifying the "compensation, rebate, or reward" as that which comes from either HUD or some other entity of the federal government. The "compensation, rebate, or reward" must be monies that are disbursed by a federal source, not just any "compensation, rebate, or reward", else congressional spending power is not implicated and the authority of the Spending Clause is not invoked to bring the unlawful conduct under the criminal jurisdiction of the federal government. That "compensation, rebate, or reward" is federal monies is implicit in § 1012's jurisdictional requirement. Section 1012 "subsection two" alone, without another statute or regulation *in pari materia*, does not implicate congressional spending power, and without an indictment or information specifically alleging either (a) the receipt of "compensation, rebate, or reward" in the form of federal funds, or (b) a federal "statute, rule, regulation, or other provision of law" that construes the alleged "compensation, rebate, or reward" as the fruit of federal spending power, a charge merely tracking the language of § 1012 "subsection two" fails to invoke congressional "power to keep a

watchful eye on expenditures and on the reliability of those who use public money". *Sabri*, 124 S.Ct. at 1947.

> to show that a statute is 'plainly adapted' to a legitimate end, then, one must seemingly show more than that a particular statute is a 'rational means', *ante*, at 1946, to safeguard that end; rather, it would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power. Cf. 8 Writings of James Madison 448 (G. Hunt ed. 1908).

Justice Thomas' concurring opinion, *Sabri*, 541 U.S. at 612-13, 124 S.Ct. at 1950.

If there is a HUD statute or regulation that could be construed *in pari materia* with § 1012, it would be either 12 U.S.C. § 1710(g) or HUD Regulation 24 C.F.R. Part 291 (See § 291.90(c)(1) and § 291.210(a)(1)). But neither § 1710(g) nor Part 291 implicate congressional spending power.

The Court of Appeals thus erred in holding that the discounts received by CHF were "benefits" within the meaning of § 666 (b) or "rewards" within the meaning of § 1012 "subparagraph two"'s "compensation, rebate or reward" as without the expenditure of federal monies, the Spending Clause is not implicated by the Defendants' activities and there is no congressional authority to bring the Defendants' activities within the constitutional reach of federal criminal jurisdiction for prosecution under 18 U.S.C. §§ 666 or 1012. Thus, this Court's review is warranted to determine if the marketing discounts offered to CHF by the Secretary of HUD as part of the sales contract agreements implicate the Spending Clause of the Constitution.

2. *The Fifth Circuit's panel decision as to 18 U.S.C. § 666 is in violation of its own strict stares decisis rules and in conflict with six other Circuits, Supreme Court decisions and Congress' own pronouncement.*

The Fifth Circuit has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. The panel completely disregarded prior binding precedent in *United States v. Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988), where it held that "the statute limits its reach to entities that receive a substantial amount of federal funds". The Fifth Circuit's firm rule that "a panel cannot overrule a prior panel decision" is based on the Fifth Circuit's strict adherence to the doctrine of *stare decisis*. "We are, of course, a strict *stare decisis* court. One aspect of that doctrine to which we adhere *without exception* is the rule that one panel of this court cannot disregard, much less overrule, the decision of a prior panel." *F.D.I.C. v. Abraham*, 137, F.3d 264, 268 (5th Cir. 1998) (emphasis added)

In *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999), the Fifth Circuit affirmed that "a panel cannot overrule a prior panel decision" unless there has been an intervening contrary or superseding decision by the Fifth Circuit sitting en banc or by the United States Supreme Court.

> It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior

panel's decision. See *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir.), cert. denied, ___U.S. ___, 119 S.Ct. 413, 142 L.Ed. 2d 336 (1998). *Burge* at 466

A Fifth Circuit panel, therefore, cannot overrule the decisions in *Westmoreland*, *Marmolejo* (which was decided by the Supreme Court as *Salinas*), *Phillips*, *Lipscomb* and *Jackson* that the receipt of federal funds by the organization in question is a requisite element to prosecution under § 666. The Fifth Circuit's holding in these cases clearly establish the requirement that the subject of a § 666 prosecution be an agent of an organization, government or agency that received *federal funds* in excess of $10,000 in a twelve month period:

Marmolejo, 89 F.3d at 1190 held that the legislative history "...states that the goal in enacting 18 U.S.C. § 666 was to protect the integrity of federal funds ... [and] the proper focus in determining whether *federal funds* constitute 'Federal assistance' under § 666(b) is 'whether *the funds disbursed* can be considered Federal assistance within a specific statutory scheme'" (emphasis added);

Phillips, 219 F.3d at 412 ("The tax assessor's office receives no federal funds."); at 414 ("Phillips was not an agent of a recipient of federal funds for purposes of § 666");

Lipscomb, 299 F.3d at 372 ("no more is required for a prosecution under § 666 than that a local government receive at least $10,000 in federal funds annually"); and at 313-14 ("The panel instead viewed Phillips as an agent of the Louisiana Tax Commission, which received no federal funds, and concluded that the statute did not reach his activity");

United States v. Jackson, 313 F.3d 231, 233 (5th Cir. 2002). ("The indictment sufficiently invoked the district court's jurisdiction, alleging violations of 18 U.S.C. § 666, including the allegation that the City of Monroe received federal funds in excess of $10,000 for each calendar year at issue.").

From the 1st and the 7th Circuits: "[T]hat such 'organization ... receives, in any one year period [federal funds] in excess of $10,000.'" *United States v. Cruzado-Laureano*, 404 F.3d 470, 483-84 (1st Cir. 2005). "In short, the plain meaning of the statute suggests that there must be an individual who acts as an agent of an organization, the individual must have unlawfully obtained funds from this organization, and the organization must receive over $10,000 in federal funds in any one year period." *United States v. Abu-Shawish*, 507 F.3d 550, 556 (7th Cir. 2007).

The Supreme Court's own decisions in *Salinas* and *Fischer* affirmed the Fifth and Eleventh Circuits' holdings in *Marmolejo* (*Salinas*), 89 F.3d at 1190 (5th Cir. 1996) (question is one of federal funds disbursed to organization) and *Fischer*, 168 F.3d at 1278 (11th Cir. 1999) ("the funds must have been received by the organization"). In *Salinas*, the Supreme Court held that the "chronology and the statutory language demonstrate, § 666 (a)(1)(B) was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies *receiving federal funds*". *Salinas*, 522 U.S. at 58, 139 L.Ed. 2d at 362. In *Fisher*, the Supreme Court held that "Section 666 of Title 18 of the United States Code prohibits acts of theft and fraud against organizations *receiving funds* under federal assistance programs." *Fischer*, 529 U.S. at 673, 146 L.Ed. 2d at 713. The Eleventh Circuit's 2002

decision in *Edgar*, subsequent to its own decision in *Fischer*, 168 F.3d at 1278 11th Cir. 1999) and the Supreme Court's decision in *Fischer*, 529 U.S. at 673, 146 L.Ed. 2d at 713 clarified the meaning of the Supreme Court's decision: "After *Fischer*, it is clear that the term 'benefits' *encompasses only federal funds* expended under sufficiently comprehensive programs." (emphasis added). *United States v. Edgar*, 304 F.3d 1320, 1325 (11th Cir. 2002).

The Eleventh Circuit's holding in *Edgar* demonstrates that the Supreme Court's intervening decisions in *Salinas* and *Fischer* did not provide an "intervening contrary or superseding decision ... by the United States Supreme Court" to allow a panel of the Fifth Circuit to overrule or disregard the Fifth Circuit's holding in *Westmoreland* that § 666 "limits its reach to entities that receive a substantial amount of *federal funds*". (emphasis added). The receipt of federal funds by an organization, such as CHF, is an implicit requirement for prosecution under § 666.

In *United States v. Mosley*, 505 F.3d 804, 811 (8th Cir, 2007), the court said that the Supreme Court has made clear that "if a precedent of the Supreme Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving the Supreme Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed. 2d 526 (1989). "The decisions of the Supreme Court remain binding precedent until the Court sees fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continued vitality." *Hohn v.*

United States, 524 U.S. 236, 252-253, 118 S.Ct. 1969 (1998).

Moreover, Congress has itself made clear by statute that receipt of Federal funds is an essential element of § 666. 18 U.S.C. § 1956(c)(7) defines "specified unlawful activity" and its Section D includes "an offense under ... section 666 (relating to the theft or bribery concerning programs *receiving Federal funds), ...*" (emphasis added). There is no further need to ponder what Congress may have intended when enacting § 666. Congress has provided that definition.

Under § 666 (b), "no funds" means no "benefits". There must be record evidence of the receipt of federal funds in excess of $10,000 by the organization within a one year period to sustain a conviction under § 666. Even the Government's arguments in *Lipscomb*, as noted by the Fifth Circuit, stated that receipt of federal funds was a required element for prosecution.

> The government argues that because funds are fungible, and the receipt of federal funds for any projects frees a state to spend more funds on other projects, *no more is required* for a prosecution under § 666 than that a local government receive at least $10,000 in Federal funds annually.

Lipscomb at 372.

Defendants' properly presented claim that § 666 did not reach their activities as CHF never received any federal funds was never ruled on by the Fifth Circuit panel, who instead exceeded their authority and disregarded not only the Defendants' many citations of authority supporting *Westmoreland*'s limitation of the reach of § 666, but overruled

Westmoreland by extending the reach of § 666 to those circumstances where the only "benefits" received were marketing discounts offered by the Secretary of HUD as part of the sales contract agreements.

The Court of Appeals thus erred in holding that the discounts received by CHF were "benefits" within the meaning of § 666 (b) and this Court's review is warranted to (a) hold the Fifth Circuit within the accepted and usual course of judicial proceedings as established by the Fifth Circuit's adoption of a strict adherence to the doctrine of *stare decisis*, and (b) resolve the conflict created by the decision below in direct conflict with the 1st, 2d, 3d, 7th, 9th and 11th Circuits, with this Court's own decisions in *Sabri, Salinas* and *Fischer* and contrary to Congressional intent.

3. A non-statutory program, not receiving Federal funds, defined and operated by a nonprofit organization outside the federal government, cannot be in pari materia with 18 U.S.C. § 1012 to define criminal activity by an employee of the organization.

The "compensation, rebate, or reward", identified as an essential element to § 1012 "subsection two" offenses, must be monies that are disbursed by a federal source, not just any "compensation, rebate, or reward", else congressional spending power is not implicated and the authority of the Spending Clause is not invoked to bring unlawful conduct under the criminal jurisdiction of the federal government.

Section 1012 "subsection two" alone, without another statute or regulation *in pari material*, does

not implicate congressional spending power the way that 18 U.S.C. § 666(b) does.

The Fifth Circuit panel opinion concludes "[w]e have no difficulty concluding that a 30% discount offered on a home purchased in exchange for nonprofit organizations participating in the SFAHP falls within the broad phrase 'something given' in exchange for 'some service'", the definition of "reward" used in the panel opinion. Yet the only agreement was between CHF, the organization, and HUD (there was no similar agreement between Defendant Hildenbrand and HUD), requires no service, and specifically says the buyer (CHF) is "providing cash or other financing *not involving FHA* [HUD]".

Further, the "Single Family Affordable Housing Program" (SFAHP) referred to by the panel opinion is not a HUD program, but is, according to HUD's own definition:

> A program, as described in a written proposal submitted to HUD, operated by a nonprofit in specific geographical areas in which the nonprofit provides affordable homeownership opportunities for low-to-moderate income buyers by purchasing, rehabilitating, and reselling HUD homes to these buyers. The program can include other homeownership activities, such as counseling. See Mortgagee Letter 2002-01, Attachment 2, for a description of the items that a nonprofit should address in the written proposal that describes its program.

HUD Mortgagee Letter 2001-30

As a non-government program, the "Single Family Affordable Housing Program", operated by CHF pursuant to CHF's proposal to HUD, was without the effect or force of federal law and could not be used to meet the legal requirements of Fed.R.Crim.Proc. Rule 7(c)(1) for a "statute, rule, regulation, or other provision of law" that is *in pari materia* with § 1012 to resolve the vagueness, indefiniteness and uncertainty inherent in "subsection two"'s "with intent to unlawfully defeat HUD's purpose" offense of § 1012. "Any vagueness, which the statute may have standing alone, is effectively eliminated by referring to specific statutes defining the particular purpose of the Department that is relevant". *Purcell* at 1077 (emphasis added). "Just the general wording of the penal statute itself puts one on notice that there are other statutes which more particularly define the meaning of § 1012." *Id* (emphasis added, internal citations omitted).

The marketing discounts offered by HUD as part of fair consideration in the sales agreement contracts between HUD and CHF were authorized by the Secretary of HUD's general disposition authority under 12 U.S.C. § 1710(g), Handling and disposal of property:

> Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, *the Secretary shall have power to* deal with, complete, rent, renovate, modernize, insure, or *sell for cash* or credit, in his discretion, any properties conveyed to him in exchange for debentures and certificates of claim. ... The Secretary may sell real and

> personal property acquired by the Secretary pursuant to the provisions of this chapter *on such terms and conditions as the Secretary may prescribe.*

The sales agreement contracts signed by CHF specifically stated in Condition of Sale (P) that "This contract contains the final and entire agreement between the Purchaser and Seller and they shall not be bound by any terms, conditions, statements, or representations, oral or written, not contained in this contract". The discounts, offered by the Secretary of HUD as a sales inducement, were not part of any federal program other than the Secretary of HUD's disposal of unwanted properties where HUD was not spending federal funds pursuant to congressional authority under the Spending Clause, but was selling unwanted properties to CHF in fulfillment of § 1710(g)'s purpose of eliminating HUD's inventory of foreclosed properties.

These discounts were merely the legally sufficient consideration offered in part to CHF in the sales agreement contract, HUD Form 9548 (9/96), and CHF was not required by the terms or conditions of the contract to provide any service or make any achievement. Since there was no service specified in the contracts, and the contracts themselves preclude any service being required by "terms, conditions, statements, or representations, oral or written, not contained in [the] contract", the discounts provided in these sales agreement contracts cannot be "rewards" within the meaning of 18 U.S.C. § 1012 as interpreted by the Fifth Circuit panel.

Housing Notice (HN) 94-74 and CFR 291 were fully promulgated on September 22, 1994, giving them the force of law. HN 94-74 clearly states,

among other things, that 1) only an approved nonprofit, government agency, tribe or individual who intends to reside in the property can purchase a HUD REO (eliminating Hildenbrand, the president of CHF, which was the purchaser); and 2) there is no financing of any kind supplied by HUD to the purchaser. *Housing Notice 94-74, paragraphs B., J.*

"Agency interpretations are accorded Chevron deference when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 553 U.S. 218, 226, 227, 121 S.Ct. 2164 (2001) and *Chevron USA v. NRDC, Inc.*, 467 U.S. 837,104 S.Ct. 2778 (1984).

HUD's purpose of eliminating HUD's inventory of foreclosed properties was accomplished through sales of HUD properties to CHF pursuant to the sales agreement contracts made on the HUD "Sales Contract", Form HUD-9548 (9/96), where the discounts provided were on such terms and conditions prescribed by the Secretary of HUD pursuant to the Single Family Property Disposition Program codified at 24 C.F.R. Part 291, an *unsubsidized federal program*:

> The disposition program for single family properties, acquired by HUD in exchange for payment of insurance claims, is authorized by section 204(g) of the Act [the National Housing Act]. The regulations governing the disposition program are codified at 24 C.F.R. Part 291. (Federal Register: September 22, 1994; Part III Single Family Property Disposition Program; Final Rule [Docket

No. R-94-1670; FR-3253-F-02] RIN 2502-AF75; I. Background.

The promulgated regulation published in the Federal Register on September 22, 1994 contained public comments and HUD's responses to those public comments. HUD's response to unnumbered comment #5 shows that 24 C.F.R. Part 291 was an unsubsidized federal program, which therefore does not implicate congressional spending power under the Spending Clause: "Comment: The program should be monitored and reports provided to the public. (3) Response: The Department does not believe there is an urgent need to devote already scarce resources to large scale monitoring of *this unsubsidized program*". *Id*, III. Public Comments, unnumbered comment #5.

The Fifth Circuit panel erred in holding that a marketing discount offered by HUD as part of fair consideration in sales agreement contracts between HUD and a nonprofit organization outside the federal government fall within the meaning of 18 U.S.C. § 1012's "compensation, rebate, or reward" to an employee of the organization.

4. Restitution terms of a signed plea agreement tracking the indictment cannot be unilaterally changed at sentencing.

Defendants were indicted on charges based on a theft of $228,400 from CHF, the organization purportedly protected under § 666. Defendants ultimately signed the plea agreement and factual resume prepared by the Government, in which, while not admitting to receiving Federal funds or other essential elements of the various charges, they

agreed that the total loss was $228,400, the amount allegedly stolen from the victim, CHF. The Pre-Sentence Report stated, however, that "there were no identified victims and/or losses under this hypothesis" and proceeded to declare that HUD was the victim of the offense and was owed $672,221 in restitution. Defendants strenuously objected to this change, but were summarily overruled by the District Court at sentencing. In the event that the District Court judgment of conviction was affirmed on appeal, Defendants' Third Point of Appeal addressed the reversible error by the District Court as to restitution, but the Fifth Circuit panel refused to address the point, citing the waiver in the very plea agreement which had been breached. "A defendant cannot waive the right to appeal an unlawful sentence." *United States v. Cockerham,* 237 F.3d 1179, 1182 (10th Cir. 2001). "An otherwise valid waiver of appellate rights may be invalidated if it results in a miscarriage of justice and an unlawful sentence or an unlawful restitution order results in a miscarriage of justice." *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004). "Due process requires that there be specific performance of the plea agreement." *Santobello v. New* York, 404 U.S. 257, 261-62, 92 S.Ct. (1971).

Having upheld Defendants' convictions, the panel erred in not reversing the District Court and ordering restitution to the alleged victim of the offense in the amount of the agreed loss.

5. The Fifth Circuit's panel decision violates the Rule of Lenity, where it expanded the reach of 18 U.S.C. §§ 666 and 1012 to include something other than federal funds.

In Justice Thomas' dissent in *Fischer v. United States*, 529 U.S. 667, 120 S.Ct. 1780 (2000), he writes:

> This expansive construction of § 666 (b) is, at the very least, inconsistent with the Rule of Lenity—which this Court does not discuss [in the instant case]. This principle requires that, to the extent that there is any ambiguity in the term "benefits", we should resolve that ambiguity in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515 (1971)

The Fifth Circuit's own opinion in *United States v. Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988), "...the statute limits its reach to entities that receive a substantial amount of federal funds..." conflicts with their opinion in the instant case. Holding that something other than federal funds would bring someone under the ambit of either §§ 666 or 1012 would violate the Rule of Lenity, and must be resolved in favor of the Defendants, as Defendants were never put on notice of what, other than federal funds, could have been received by the organization to qualify as "benefits". Nor were Defendants ever put on notice that an unsubsidized Federal program could confer a "reward" to an employee of an organization participating in that program such that she would be in violation of § 1012.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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A. APPENDIX

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 07-10210
D.C. Docket No. 3:04-CR-318-1

United States of America, Plaintiff – Appellee
v.
Barbara Hildenbrand, Defendant – Appellant

Consolidated with No. 07-10211

United States of America, Plaintiff – Appellee
v.
Gerald Stone, Defendant – Appellant

Appeal from the United States District Court for the Northern District of Texas, Dallas

Before DAVIS and SOUTHWICK, Circuit Judges, and DRELL, District Judge (District Judge for the Western District of Louisiana, sitting by designation):

Defendants Barbara Hildenbrand and Gerald Stone appeal their guilty plea convictions for defrauding the Department of Housing and Urban Development, conspiring to steal from an organization receiving federal funds, and tax evasion primarily on the basis that the factual resumes submitted in support of their guilty pleas are insufficient to support their convictions of these crimes. We disagree and affirm appellants'

convictions. Because of our disposition of this threshold issue and the appeal waiver in their plea agreements, we do not reach any other issues raised by the defendants and dismiss the appeals of their sentences.

I.

Barbara Hildenbrand conducted business in the name of Community Housing Fund (CHF), a 501(c)(3) nonprofit organization out of Irving, Texas. CHF was formed for the purpose of providing affordable housing to low-income persons. Hildenbrand was the president of CHF and responsible for all operations. CHF was selected to participate in HUD's Single Family Affordable Housing Program (SFAHP or "the program"), which was designed to help persons with low-to-moderate incomes purchase affordable homes. Under the SFAHP, HUD offered certain of its properties to nonprofit companies for purchase at discounted prices, usually 10% to 30% below the fair market value.

Through CHF, Hildenbrand purchased discounted homes from HUD under the program. She then engaged contractors to rehabilitate the houses for sale. Hildenbrand used several contractors to perform the rehabilitation work on the houses CHF purchased, but Gerald Stone, who later became her husband and who conducted business under the name of Ranscott Construction, Inc. (RCI), performed the vast majority of the repair and warranty work on the program houses.

HUD created the SFAHP to sell properties at a discount to nonprofits, who would then pass on the discount received from HUD to increase home ownership opportunities for low- and moderate-income families and individuals. The agency has

rules about the price nonprofits could realize from the property – for example, limiting the sales price of properties sold at a 30% discount to a maximum of 110% of the net development cost of the property. Rehabilitation expenses are an allowable cost in calculating net development cost. Thus if Hildenbrand's and Stone's scheme fraudulently increased the development cost of a property, it would in turn increase the property's allowable sales price thus thwarting the goal of the program to pass the discount granted by HUD onto the ultimate home owner or renter.

In her factual resume, Hildenbrand made admissions regarding her purchase of two discounted houses from HUD under the SFAHP. On January 25, 1999 she purchased, through CHF, residential property at 5720 Forest Oaks, Dallas, at a 30% discount, worth $5,025. On December 6, 1999, she purchased a residence at 2449 Maverick, also in Dallas, for which she received a 30% discount, worth $15,900. Hildenbrand stipulated that she received the discounts for the purchase of these two homes from HUD with the intent to defraud HUD and unlawfully to defeat its purposes. Hildenbrand used Stone, through RCI, to perform the repair work on the program homes. Hildenbrand admitted that, by using CHF money, she and Stone defrauded HUD and defeated the purposes of the SFAHP by increasing the costs associated with the particular houses through improper payments to RCI. This in turn increased the ultimate prices of the residences, making them less affordable to the low income purchasers of the homes, the intended beneficiaries of the program.

Specifically, Hildenbrand and Stone engaged in a conspiracy to steal funds from CHF by writing

checks to RCI and by falsely documenting the stolen money as being related to repair costs payable to RCI. Hildenbrand admitted issuing a CHF check on January 20, 2000, for $24,000, payable to cash, used to purchase a Florida cashier's check in the same amount payable to a realty escrow account for the purchase of a condominium in Stone's name. She further admitted issuing a CHF check on January 28, 2000, for $222,927.73, payable to cash, which was used to purchase another cashier's check, which was in turn used to purchase the condominium in Stone's name. On the same date, Stone used the $246,927.73 in CHF funds to purchase a condominium in North Palm Beach, Florida.

On or about May 8, 2000, Hildenbrand issued a CHF check for $246,500, payable to RCI, which Stone endorsed back to CHF to document the CHF funds he had already received for the January 2000 condominium purchase. On the same date, Hildenbrand, aided by CHF's bookkeeper, falsely documented in CHF records that $30,000 of the payments related to the January 2000 condominium purchase were for work performed by Stone in relation to the addresses at 5720 Forest Oaks and at 2449 Maverick. However, CHF's books reflected that final payment had been made to RCI for work done on both properties. For example, CHF acquired the house on Maverick on December 10, 1999; it paid RCI $500 on that date and an additional $5,500 on January 7, 2000, for rehabilitation work. The January 7, 2000 payment was marked "final" by the RCI invoice and CHF records. However, on May 8, 2000, CHF paid RCI an additional $20,000 for supposed rehabilitation work on the Maverick residence. The funds for that additional payment were lumped with a number of other payments used

to document funds previously paid to RCI through the CHF checks issued on January 20 and 28, 2000 for the Palm Beach Condo. The invoices for work on the Forest Oaks residence had similarly been marked "final" on June 1, 1999, but on May 8, 2000, CHF paid RCI an additional $10,000 for supposed rehabilitation work on that address.

Investigation revealed that Hildenbrand, operating through CHF, purchased at least 23 houses in Texas and Florida during 1999 and 2000 from HUD under the SFAHP, receiving discounts totaling $152,906.80 as inducement to purchase the homes. CHF would secure interim financing for program houses without disclosing to the banks the discount it received from HUD; it would use those funds to pay RCI to rehabilitate the homes. In many instances, the actual cost to rehabilitate the houses was less than the amount paid to RCI. Additionally, HUD requires that SFAHP participants use independent, unrelated contractors for work on program properties. In violation of this rule, Stone was intimately involved with Hildenbrand's business dealings, and was listed on bank documents as CHF's area manager and vice president, with cosignatory authority on CHF's bank account.

In his factual resume, Stone admitted that he and Hildenbrand willingly conspired to embezzle, convert, and misapply property in excess of $5,000 owned by an organization receiving federal assistance, in violation of 18 U.S.C. 666. Specifically, Stone admitted that he and Hildenbrand stole and unlawfully converted money from CHF bank accounts for non-business-related purchases, then falsely claimed that portions of the payments were made for legitimate rehabilitation work performed by Stone through RCI. The factual

resume listed 23 homes purchased by CHF from HUD under the SFAHP in Texas and Florida at discounts of 10% to 30% below the fair market value. Stone admitted that he coordinated the repair and warranty work on the Texas homes but that Hildenbrand hired a different contractor to do the work on the Florida residences.

For the Texas homes, Hildenbrand had the CHF bookkeeper make entries showing amounts paid to Stone were for rehabilitation of properties in Texas that had previously been marked as having received "final payment." For example, CHF purchased a residence at 1502 Bayshore in Garland, Texas, in March 1999; it paid RCI $10,000 on March 25, 1999, for rehabilitation work and paid $5,000 on June 7, 1999, which payment was marked "final" by RCI and CHF records. Over one year later, on July 6, 2000, CHF paid RCI an additional $165,400 [sic] for supposed rehabilitation work on the Bayshore house. The funds for this payment were lumped in with a number of other payments used to document funds previously paid to RCI through a CHF check on March 13, 2000, in the amount of $212,500.

Additionally, Hildenbrand had the CHF bookkeeper document falsely that several amounts paid to Stone on January 20 and 28, 2000, were related to rehabilitation of properties in St. Petersburg and Ft. Lauderdale, Florida, despite the fact that Stone did not perform any work on those Florida properties. Stone stipulated that the listed payments were not legitimate and constituted theft from CHF; he further conceded that, in 2000, he received $459,427.73, in unlawfully converted funds from CHF, which money he used to purchase the aforementioned condominium and a $212,500 yacht known as the "Shelby Jean."

Stone additionally admitted that the $459,427.73 qualified as taxable income for federal income tax purposes, which income he intentionally failed to report on his 2000 individual tax return, filed on July 27, 2001. Stone conceded that he willfully attempted to evade and defeat a large part of the income tax due to the U.S. for the calendar year 2000. As a result of his intentional failure to report his true income, Stone admitted that he failed to report and pay additional taxes in the amount of $179,479 to the U.S. for the 2000 tax year.

Hildenbrand and Stone were charged in a 36-count indictment with conspiracy to steal from an organization receiving federal assistance, in violation of 18 U.S.C. 666 and 371 (count 1); defrauding HUD, in violation of 18 U.S.C. 1012 (counts 2 through 24); theft from an organization, in violation of 18 U.S.C. 666 (counts 25-27); money laundering, in violation of 18 U.S.C. 1957 (counts 28-33); and, as to Stone, two counts of tax evasion, in violation of 26 U.S.C. 7201 (counts 34-35).[1]

Hildenbrand pleaded guilty, pursuant to a written plea agreement, to counts 2 and 3 of the indictment, two counts of defrauding HUD. As part of her plea, Hildenbrand waived the right to appeal or collaterally challenge her conviction and sentence, except as to 1) a sentence exceeding the statutory maximum; 2) a sentence resulting from arithmetic error; 3) a challenge to the voluntariness of her plea or waiver; and 4) claims of ineffective assistance of counsel. The substance of the factual basis for her plea is set forth above. Following a Rule 11 hearing before a magistrate judge, the district court accepted

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[1] Count 36 alleged forfeiture of assets.

Hildenbrand's plea as knowing, voluntary, and supported by a sufficient factual basis.

Stone similarly pleaded guilty, pursuant to a written plea agreement, to count 1, conspiracy to commit theft against an organization, and to count 35, tax evasion by knowingly filing a fraudulent tax return for the year 2000. Stone's written plea agreement also contained a waiver-of-appeal provision identical to the waiver provision in Hildenbrand's plea agreement. Following a Rule 11 hearing before a magistrate judge, Stone's plea was also accepted as knowing, voluntary, and supported by a sufficient factual basis.

The PSR determined Hildenbrand's guidelines range at 18-24 months of imprisonment, though the statutory maximum was 12 months. Stone's PSR determined his guidelines range at 24 to 30 months of imprisonment. Both PSRs recommended restitution to HUD, characterizing HUD as the victim of the offenses.

Hildenbrand and Stone both objected to the PSR, not on the ground that the offense-level calculations were incorrect, but on the ground that the facts as described in the offense conduct showed that no crime was in fact committed. They further objected to the recommended restitution. Hildenbrand separately filed a motion to dismiss due to the insufficiency of the factual basis for her plea, which motion was denied. The probation officer recommended that the objections be overruled, determining that the defendants' allegations were refuted by their factual resumes, and that, inasmuch as they sought to withdraw their guilty pleas, the three-level acceptance-of-responsibility reductions should be rescinded.

The defendants were jointly sentenced. The district court overruled both defendants' objections to the PSR, specifically determining that Hildenbrand's plea was supported by admissions of fact that satisfied each element of the charged offenses and that Stone's factual resume similarly satisfied each element of the charged offenses. The district court declined to award either defendant credit for acceptance of responsibility; in Stone's case, the resulting guidelines range was 27 to 33 months. The district court sentenced Stone below the guidelines range, to 24 months on each count, to run concurrently, and ordered him to pay restitution in the amount of $265,516 to the IRS and $672,221 to HUD, owed jointly and severally with Hildenbrand. It sentenced Hildenbrand to the statutory maximum of 12 months on each count, to be served consecutively, for a total of 24 months, and ordered her to pay $672,221, jointly and severally with Stone, in restitution to HUD. The defendants timely appealed.

II.

The defendants renew their arguments that there is an insufficient factual basis for their please. The Government counters that their arguments are barred by the waiver of appeal provisions in their written plea agreements. Neither defendant argues that their plea, or the waiver provision, was unknowing or involuntary. Instead, they argue that the waiver does not bar review of their claims that the factual basis is insufficient to support their pleas. This court reviews *de novo* whether a waiver of appeal bars an appeal. *United States v. Baymon,* 312 F.3d 725, 727(5th Cir. 2002).

Even valid waivers do not bar a claim that the factual basis is insufficient to support the plea. *See*

Baymon, 312 F.3d at 727 ("[E]ven if there is an unconditional plea of guilty or a waiver of appeal provision in a plea agreement, this Court has the power to review if the factual basis for the plea fails to establish an element of the offense which the defendant pled guilty to."); *United Stats v. Jacquez-Beltran*, 326 F.3d 661 (5th Cir. 2003) (Waiver enforced because the allegation of the indictment and the stipulations supporting the plea satisfy the essential elements of the offense); *cf. United States v. Inguanzo*, 166 Fed. Appx. 110, 111 (5th Cir. 2006) ("Whether a defendant can waive his right to appeal on the ground that there was an insufficient factual basis to support his guilty plea is an open question in this circuit."). The purpose of the rule is to protect a defendant who may plead guilty with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the definition of the charged crime. *Baymon*, 312 F.3d at 727. Accordingly, this court must review the merits of the claims that the factual basis is insufficient to support the defendants' pleas.

On each count, if the factual basis is found to be sufficient to support the plea, then the plea agreement can be upheld and the waiver of appeal provision would bar any additional arguments raised on appeal. *See Baymon*, 312 F.3d at 729 (concluding, after addressing the sufficiency of the factual basis for the plea and finding it adequate, that the waiver-of-appeal provision barred consideration of the defendant's remaining sentencing arguments). If the factual basis is not sufficient as to any count, the conviction should be vacated, and the case remanded for further proceedings without consideration of any additional issues raised. *See United States v. Carter*, 117 F.3d 262, 265 (5th Cir. 1997) (Conviction

reversed, sentence vacated and case remanded for further proceedings.)

III.

We turn then to whether each defendant's factual basis is sufficient to support his or her respective guilty pleas. A district court cannot enter a judgment of conviction based on a guilty plea unless it is satisfied that there is a factual basis for the plea. Fed. R. Crim. P. 11(b)(3). The district court must compare "(1) the conduct to which the defendant admits with (2) the elements of the offense charged in the indictment or information." *United States v. Marek*, 238 F.3d 310, 315 (5th Cir. 2001)(en banc).

As both defendants objected on this basis in the district court, this court regards the district court's acceptance of a guilty plea as a factual finding to be reviewed for clear error. *United States v. Adams*, 981 F.3d 505, 509 (5th Cir. 1992). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." *United States v. Gonzales*, 436 F.3d 560, 584 (5th Circ. 2006)(internal quotation omitted).

When determining whether there is a factual basis for a guilty plea, inferences may be "fairly drawn" from the evidence adduced after the acceptance of a guilty plea but before or at sentencing. *United States v. Dyer*, 136 F.3d 417, 425 n. 13 (5th Cir. 1998). "If sufficiently specific, an indictment or information can be used as the sole source of the factual basis for a guilty plea." *Adams*, 961 F.2d at 509; *United States v. Bcchynsky*, 949 F.2d 722, 730 (5th Cir. 1991) (record read in pari material with indictment established that a factual basis existed); *cf United States v. Boatright*, 588 F.2de 471, 475-76 (5th Cir. 1979) (indictment not

adequate when defendant was charged with conspiracy and indictment failed to allege facts tying defendant to the same). The PSR may also be considered in determining whether there was a sufficient factual basis to support a defendant's guilty plea so long as the court indicates on the record that it relies on the PSR. *See Adams*, 961 F.2d at 509, n.3.

Hildenbrand's guilty plea for defrauding HUD under § 1012

Hildenbrand argues that the facts as pleaded do not establish that she committed the offense of defrauding HUD. Section 1012 provides, in pertinent part, that "[w]hoever receives any compensation, rebate or reward, with intent to defraud [HUD] or with intent unlawfully to defeat its purposes ... shall be fined under this title or imprisoned no more than year, or both." 18 U.S.C. 1012. Hildenbrand argues that her factual basis does not support a conviction under this section for the following reasons: 1) CHF committed the offense, not her personally; 2) the discounted home prices CHF received from HUD through the SFAHP do not qualify as "compensation, rebate, or reward;" and 3) there is no evidence that she intended to defraud HUD.

Hildenbrand's contentions that there is no evidence to show that she, rather than CHF, committed the offense or to show that she intended to defraud are defeated by the specific admissions in her factual resume. She stipulated both that she was the president of and decision maker for CHF and that her intent was to defraud HUD and to unlawfully defeat its purposes under the SFAHP. The Factual Resume states "Hildenbrand conducted

business in the name of Community Housing Fund (CHF)", "Hildenbrand, by and through the nonprofit organization CHF, received money and benefits" and "Hildenbrand agrees and stipulates that she received the above discounts from HUD with the intent to defraud HUD and with the intent unlawfully to defeat its purposes."

Her claim that the 30% discount she received on the two home purchases implicated in her plea do not qualify as "compensation, rebate or reward" within the meaning of the statute is similarly unavailing. Hildenbrand argues that terms "compensation, rebate or reward"are not statutorily defined and that their common meanings do not encompass a discount. She essentially contends that the statute contemplates only some form of direct payment and, as a result, because she, through CHF, did not receive any direct payment from HUD, her conduct does not violate the statute.

Hildenbrand is correct that the terms "compensation," "rebate," and "reward" are not statutorily defined, and research reveals no case from this or any other circuit to provide guidance on the issue. However, a "discount" is clearly encompassed within the ordinary, common-sense meaning of the term "reward," such that the district court's conclusion that the factual basis was sufficient was not clearly erroneous.

Absent a statutory definition or definitive clue, the meaning of the term "reward," must be given its ordinary, "everyday meaning." *See Watson v. United States*, 128 S.Ct. 579, 583 (2007) (internal quotation marks and citation omitted). Contrary to Hildenbrand's assertion, the everyday meaning of the term "reward" is broad enough to contemplate more than a direct payment to the recipient. Rather,

Webster's Third New International Dictionary (1981) defines "reward" as "something that is given in return for good or evil done or received ... and esp. that is offered or given for some service or attainment." We have no difficulty concluding that a 30% discount offered on a home purchase price in exchange for nonprofit organizations participating in the SFAHP falls within the reach of the broad phrase "something given" in exchange form "some service."[2]

Sufficiency of the Factual Basis for Stone's §§ 371 and 666 Convictions

Stone also challenges the sufficiency of the factual basis to support his pleas. First, he contends that the facts were insufficient to support his plea under count 1, conspiracy to commit theft against an organization receiving federal assistance, in violation of 18 U.S.C. 371 and 666. Section 666 applies to an "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). The section to which Stone pleaded guilty prohibits any agent of the organization from embezzling, stealing, defrauding, or unlawfully converting property of the organization valued at $5,000 or more. 18 U.S.C. 666(a)(1)(A). Section 371 makes it unlawful for two or more persons to conspire to defraud the U.S. or any of its agencies.

Stone does not challenge the sufficiency of the factual basis to establish a conspiracy. To the extent that he now seeks to challenge his plea on the

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[2] See also our discussion of the similar term "benefit" infra under § 666 relating to Stone's conviction.

ground that he did not actually commit any wrongdoing, that he was entitled to all CHF payments he received, that CHF followed all HUD rules and regulations, and that the Government erroneously relied on CHF's internal bookkeeping records to prove the offense, the claims lack merit. The allegations that neither Stone nor CHF committed any wrongdoing are directly refuted by the sworn admissions in Stone's factual resume, which he has never attempted to withdraw. Moreover, Stone does not explain why the Government could not rely on CHF's bookkeeping records to prove the offense particularly in light of that factual resume. Stone's factual resume lists payments to Stone that he admits were not legitimate, i.e. for work he did not actually perform.

The majority of Stone's brief is devoted to the argument that the facts are insufficient to establish a violation of 666. Similar to the argument Hildenbrand raises, Stone urges that the 10% to 30% discounts CHF received under the SFAHP do not qualify as "benefits" under a federal program involving any "federal assistance" within the meaning of Section 666 because such terms contemplate the payment and disbursement of federal funds. He contends that the discounts were merely an incentive and that Section 666 does not apply here, where the two parties, HUD and CHF, were engaged in a quid pro quo, purely commercial transaction, with both parties deriving a benefit from the venture.

Stone is correct that the term "benefit" is not statutorily defined. Research reveals no case from this or any other circuit addressing the question whether a HUD discount to a nonprofit organization under the SFAHP constitutes a "benefit" within the

meaning of that section. Although, as above, it appears that the term "discount" is encompassed within the ordinary, "everyday meaning" of the term "benefit," the inquiry does not end there as the term "federal assistance" is similarly undefined.

Merriam-Webster's Collegiate Dictionary (10th ed. 2002) defines "benefit" as "something that promotes well-being: ADVANTAGE;" or a "useful aid: HELP." As the Government argues, a discount is, by its very nature, a benefit to the person who receives it; it provides an advantage, useful aid, and help to the recipient. Stone's argument that his construction of "benefit" comports with common sense is unpersuasive. The argument is purely one of form over substance. Although received in the form of a discount, it is undisputed that CHF received a quantitative monetary benefit from HUD through the discounts under the SFAHP. Stone's factual resume lists the monetary value of each discount received by CHF in its purchase or program homes from June 1999 through March 2000, which discounts totaled $152,906.80.[3]

Nevertheless, Stone urges that CHF was not an organization covered by Section 666(b) because there was no federal assistance in the absence of any loan or other direct financial assistance from HUD. Even if it is assumed that a discount constitutes a benefit within the meaning of Section 666, the benefit must be received through a federal program "involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C.

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[3] That the benefit is intended ultimately to pass to the low-to-moderate income purchaser of the program homes does not change the result. *See Fischer v. United States*, 529 U.S. 667, 677 (2000) (recognizing that there may be multiple beneficiaries of federal programs).

666(b). This court has recognized that Section 666's definition of federal program and federal assistance is "ambiguous." *United States v. Marmolejo,* 89 F.3d 1185, 1189 (5th Cir. 1996), *aff'd sub nom. Salinas v. United States,* 522 U.S. 52 (1997)(Sheriff housing federal prisoners found guilty of violation Section 666 for accepting bribes from prisoners in exchange for conjugal visits). "Although it is clear that the assistance can consist of a grant, contract, subsidy, loan, guarantee, or insurance, the other defining qualities of 'Federal assistance' are still unclear." *Id.* This court held that the term should be broadly construed. *Id.*

The Supreme Court has described the coverage of 666 as "expansive, both as to the [conduct] forbidden and the entities covered." *See Fischer,* 529 U.S. at 678 (internal quotation marks and citation omitted). This court has noted that "the extent of the federal government's assistance programs will bring many organizations and agencies within the statute's scope," but cautioned that "the statute limits its reach to entities that receive a substantial amount of federal funds." *United States v. Westmoreland,* 841 F.2d 572, 578 (5th Cir. 1988). In *Marmolejo,* this court stated that the legislative history behind 666 "was to protect the integrity of federal funds by punishing theft and bribery involving Federal programs for which there is a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." 89 F.3d at 1190 (internal quotation marks and citation omitted). For example, health care organizations participating in Medicare are organizations covered by Section 666(b). *See Fischer,* 529 U.S. at 681-82.

Stone appears to urge that the legislative history supports his conclusion that an organization must be

the recipient of some direct federal financial assistance to fall within Section 666(b). The Government acknowledges that the legislative history indicates that 666 is designed to protect federally disbursed funds, but it does not squarely address the question whether the statute reaches federal programs that offer some monetary benefit but do not directly disburse funds. Because there is a statutory scheme authorizing the discounts on SFAHP homes and because the scheme furthers the public policy objectives of both expanding home ownership opportunities for low- and moderate-income purchasers and strengthening neighborhoods, we conclude that participation in the SFAHP qualifies as federal assistance.

No cases address the narrow question whether a nonprofit organization receiving discounts on home purchase prices for participating in the SFAHP through HUD is a covered organization under 666(b) because it receives the qualifying benefits under a qualifying federal-assistance program. Based on *Fischer*, SFAHP qualifies as a program receiving federal assistance for purposes of the statute. In *Fischer*, the defendant was convicted of defrauding a hospital. 529 U.S. at 682. The hospital was a Medicare provider authorized to treat patients covered by Medicare. The Supreme Court found that the funds the hospital received from Medicare patients were benefits under 666 because the hospital derived significant advantages through satisfaction of the Medicare participation standards imposed by the government. "[I]t cannot be disputed the providers themselves derive significant advantage by satisfying the participation standards imposed by the Government. These advantages constitute benefits within the meaning of the federal

bribery statute, a statute we have described as 'expansive,' both as to the [conduct] forbidden and the entities covered." *Id.* At 678.

CHF similarly received advantages as a result of satisfying the standards for participating in the SFAHP, which is part of a federal statutory scheme to promote public policy objectives. CHF as well as the renters and buyers of the homes bought and rehabilitated through the program are both beneficiaries of the federal program. *See Fischer*, 529 U.S. at 677-678. Accordingly, the SFAHP is a federal program involving federal assistance and Stone's challenge to his 371 and 666 convictions on this basis fails.

Sufficiency of the Factual Basis for Stone's 7201 Conviction

Stone additionally challenges the sufficiency of the factual basis to support his guilty plea to tax evasion for the year 2000. To establish a violation under 26 U.S.C. 7201, the Government must prove the following elements: 1) a tax deficiency; 2) an affirmative act constituting an evasion or attempted evasion of the tax; and 3) willfulness. *United States v. Sallee*, 984 F.2d 643, 646 (5th Cir. 1993).

Stone now argues that the factual basis is insufficient to support his plea because the Government failed to establish that the income he was charged with failing to report was actually earned in the calendar year 2000; rather, he now contends that the income was earned in 1999. He further argues that the Government filed to prove any willfulness on his part.

Stone's arguments are squarely controverted by his sworn admissions in the factual resume supporting his plea. Specifically, Stone stipulated

that he willfully failed to report $459,427.73 in earned income for the year 2000 by filing a fraudulent tax return and that he knowingly failed to report and pay an additional tax of $179,479 for the 2000 tax year. These stipulated facts establish each element of the 7201 offense, and Stone's challenge to the sufficiency of the factual basis for his plea to count 35 thus fails.

IV.

For the foregoing reasons, we find that the factual resumes submitted in support of Hildenbrand's and Stone's guilty pleas are sufficient to sustain their convictions. The remaining issues appellants raise are related to their sentences. Because the defendants waived their right to appeal their sentences, we DISMISS THE APPEAL of their sentences, and AFFIRM their convictions.

Denial of Rehearing

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10210
United States of America, Plaintiff – Appellee
v.
Barbara Hildenbrand. Defendant – Appellant

Consolidated with 07-10211
United States of America, Plaintiff – Appellee
v.
Gerald Stone, Defendant – Appellant

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITIONS FOR REHEARING AND
REHEARING EN BANC
(Opinion 05/13/08, 5 Cir., _____, ____ F.3d _____)

Before DAVIS, SOUTHWICK, Circuit Judges, and DRELL, District Judge

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

(signed) W. Eugene Davis
United States Circuit Judge

Filed with 5th Circuit: June 16, 2008

Statutory Provisions

18 U.S.C. § 1012. Department of Housing and Urban Development transactions

Whoever, with intent to defraud, makes any false entry in any book of the Department of Housing and Urban Development or makes any false report or statement to or for such Department; or

Whoever receives any compensation, rebate, or reward, with intent to defraud such Department or with intent unlawfully to defeat its purposes; or

Whoever induces or influences such Department to purchase or acquire any property or to enter into any contract and willfully fails to disclose any interest which he has in such property or in the property to which such contract relates, or any special benefit which he expects to receive as a result of such contract

Shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 666. Theft or bribery concerning programs receiving Federal funds.

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that –

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or

agency; or [Section (a)(1)(B) and Section (a)(2) omitted]

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section –

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the

commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. 1956. Laundering of monetary instruments
[in pertinent part]
(c) As used in this section ...
(7) the term "specified unlawful activity" means –
(D) an offense under ... section 666 (relating to theft or bribery concerning programs receiving Federal funds), ...

12 U.S.C. § 1710. Payment of insurance
[in pertinent part]
(g) Handling and disposal of property; settlement of claims.

Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, the Secretary shall have power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any properties conveyed to him in exchange for debentures and certificates of claim as provided in this section; and notwithstanding any other provision of law, the Secretary shall also have power to pursue to final collection, by way of compromise or otherwise, all claims against mortgagors assigned by mortgagees to the Secretary as provided in this section: ... The Secretary may sell real and personal property acquired by the Secretary pursuant to the provisions of this chapter on such terms and conditions as the Secretary may prescribe.

Title C.F.R. § 291
(in relevant part)

Title 24 C.F.R. § 291.90. Sales Method

HUD will prescribe the terms and conditions for all methods of sale. HUD may, in its discretion, on a case-by-case basis or as a regular course of business, choose from among the following methods of sale: ...

(c) Direct sales methods. There are three types of direct sales methods: (1) Direct sales of properties without insured mortgages to governmental entities and private nonprofit organizations, the procedures for which are described in Sec. 291.210(a); ...

Title 24 C.F.R. § 291.210. Direct Sales Procedures

When HUD conducts the sales listed in Sec. 291.90(c), it will sell the properties on an 'as-is' basis, without repairs or warranties, and it will follow the applicable sales procedures provided in this section.

(a) Direct sales of properties without insured mortgages to governmental entities and private nonprofit organizations. (1) State and local government, public agencies, and qualified private nonprofit organizations that have been preapproved to participate by HUD, according to standards determined by the Secretary, may purchase properties directly from HUD at a discount off the list price determined by the Secretary to be appropriate, but not less than 10 percent, for use in HUD and local housing or homeless programs.

Housing Notice 94-74

U.S. Department of Housing and Urban Development Office of Housing

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Special Attention of:

Notice H 94-74 (HUD)

All Directors of Housing
All Directors of Housing Management
All CPD Directors
All Chief Property Officers
Issued: 09/29/94 Expires: 09/30/95

Cross References:
59 FR 48702 (Sept. 22, 1994)
Handbook 4310.5, REV-2
Housing Notice 94-43

Subject: Revisions to SFPD Sales Procedures

This Notice provides guidance for the implementation of 24 CFR Part 291 published in the Federal Register as a Final Rule on September 22, 1994, and emphasizes revisions being made to the Regulation. It also supersedes Housing Notices 93-82, 94-44, and any provisions of Housing Handbook 4310.5, REV-2, which are not consistent with this Notice. However, unless otherwise specifically stated herein, sales procedures described in the Handbook still apply.

Throughout this Notice, reference is made to Directors of Housing Management having Field Office responsibility for the program. After the next stage of re-organization takes effect, these

responsibilities will automatically come under Single Family Division Directors in most Field Offices.

A. Statement of Purpose

The purpose of the Single Family Property Disposition Program is to reduce the inventory of acquired properties in a manner that expands homeownership opportunities, strengthens neighborhoods and communities, and ensures a maximum return to the mortgage insurance fund.

B. Owner-Occupant Purchaser

Owner-Occupant Purchaser means a State, governmental entity, tribe, or agency thereof; or private nonprofit organization which has been pre-approved to participate in the program -- in addition to an individual purchaser who intends to use the property as his or her principal residence. Governmental entities include those with general governmental powers (e.g. a city or county), as well as those with limited or special powers (e.g., public housing agencies).

Standards for pre-qualifying nonprofits not previously qualified to participate in other HUD programs are provided in Attachment 1. The basic responsibility for pre-qualifying participants rests with Housing; however, in individual Field Offices CPD may accept this responsibility in whole or on a shared basis with Housing.

C. Revitalization Area

Revitalization Area means a neighborhood that has a significant concentration of vacant properties, including properties needing extensive repairs that have been in HUD's inventory at least eight months; exhibits other characteristics of economic

distress; and has been targeted by the locality for establishing affordable housing and providing adequate supportive services.

Beginning in Fiscal Year 1995, and annually thereafter, Directors of Housing Management will determine areas that are suitable for applying deep discount pricing (30 percent off fair market value) on HUD-owned properties being offered without mortgage insurance, in consultation with local officials. Standards for making this determination will be identical to those applied in Fiscal Year 1994 for determining "exception sales" on individual properties. These are:

1. The neighborhood has a significant concentration of vacant properties, including those owned by HUD, and exhibits other characteristics of economic distress;

2. The neighborhood is targeted by the locality for establishing affordable housing and providing adequate supportive services;

and,

3. In general, properties remain in HUD's inventory for at least eight months OR require minimum property standards (MPS) related repairs exceeding $15,000, or 50 percent of the estimated "as repaired value," whichever is greater.

For tracking purposes, revitalization areas will still be identified by ZIP code. If appropriate, Field Office staff may consider the entire ZIP code a revitalization area or only those neighborhoods within the ZIP code meeting the standards defined above. In either event, the 30 percent discount shall apply to uninsurable properties only located within the targeted revitalization area.

Where the City has a HUD-approved Comprehensive Housing Affordability Strategy (CHAS), or successor plan, it is important to ensure that revitalization areas are coordinated with it to the maximum extent feasible. For this purpose, Housing staff must consult with Community Planning and Development (CPD) staff in the appropriate local HUD Office before contacting City officials, and, for those jurisdictions having significant HUD inventories, become familiar with the City's plans for those areas.

Directors of Housing Management shall identity their revitalization areas by ZIP code and notify the Director, Single Family Property Disposition, Headquarters, of their selections by August 31, 1995, and annually thereafter. Revitalization area designations shall remain in effect for the balance of the following fiscal year. However, if a property has been offered to a nonprofit or public agency prior to implementation of new fiscal year revitalization areas, that offering shall remain open until the nonprofit or public agency has had its opportunity to purchase according to the guidelines and timeframes referenced in G.2. herein. The sale of such a property shall be at the appropriate discount in effect at the time of the original offering.

D. Exceptions for Individual Properties

Individual uninsurable properties not located in a revitalization area, may occasionally be sold at the 30 percent discount if they meet the three standards for establishment of a revitalization area and are located in a neighborhood where seller concessions, such as take-back financing, are common and/or a predominance of other buyers in the area are investor owners. If more than ten of these deeply

discounted individual transactions occur within a Field Office jurisdiction during a Fiscal Year, the Director of Housing Management must approve each such sale in writing, briefly stating his/her rationale.

E. Establishing List Price

Properties outside of Revitalization Areas, except those qualifying under the "exception" criteria (See D. above), shall be priced in accordance with standard procedures. Properties located within Revitalization Areas shall be priced as follows:

1. Upon acquisition, it is necessary to determine the level of repairs needed to bring the property up to the intent of MPS; i.e., based on visual inspection, the property is structurally sound, free of roof leaks, and has operable mechanical systems.

2. If the estimated repairs exceed $5,000, the property shall be assigned to a qualified specification writer, or fee inspector, for a detailed listing of the repairs, with cost estimates, required for the property to meet MPS. The initial determination as to whether the MPS-related repairs exceed $5,000 may be made, at Field Office option, by the REAM or the appraiser. Assignment of the case to a specification writer shall be independent of other requirements of the REAM and appraiser and it is not expected that this action will alter present requirements, including timeliness, for these contractors to perform other contract services.

3. The specification writer may be obtained under a Field Office contract, under which work orders could be placed by HUD, the REAM, or the appraiser, or the REAM may be required to procure the specification services directly, i.e., the specification writer would be a subcontractor to the

REAM. Orders for this service could be placed by HUD, the REAM or the appraiser.

4. If the property in its present condition meets the intent of MPS, or can be made to meet the intent of MPS by the completion of a few minor repairs, not to exceed $5,000, the appraiser then estimates the "as repaired value" as if the property was brought up to market typical condition, and also estimates the cost of MPS repairs, if any. Field Office staff will subtract the MPS related repair costs from the "as repaired value" to arrive at list price; however, if the REAM (or appraiser) determines that the property requires major repairs or rehabilitation, estimated to be in excess of $5,000 in order to meet the intent of MPS, the property must be assigned to a specification writer, according to the optional procedure adopted by the Field Office. (Attachment 3 of this Notice is a rehabilitation checklist which may be helpful to the specification writer. It is for guidance only and does not represent any type of warranty by HUD. This disclaimer must be contained on any locally devised rehabilitation checklist given to the public.) Upon receipt of the "as repaired value" appraisal and the specification writer's report, the Field Office will subtract the cost of the MPS-related repairs, as determined by the specification writer, to arrive at the list price.

F. Properties Eligible for Mortgage Insurance (See Attachment 2)

Properties eligible for mortgage insurance shall be offered competitively to owner-occupant buyers (See B. above) for a period of 10 to 30 days, as determined by the Field Office, prior to being placed on the general market. Property shall be sold to the net highest bidder without taking into consideration

any applicable discount. In the event of identical tie net bids being received, award of the sales contract is determined by drawing lots.

G. Properties Not Eligible for Mortgage Insurance (See Attachment 2)

State and local governments, public agencies, including public housing authorities, and qualified private nonprofit organizations that have been preapproved to participate by HUD, may purchase properties in this category directly at a discount off list price for use in HUD and local housing or homeless programs. This opportunity shall be given prior to their being offered to individuals who will occupy them as their primary residence or to the general public.

1. HUD Notification Procedures

Nonprofits and public agencies participating in this program must designate areas of interest by ZIP code in writing to the Chief Property Officer in the local HUD Office. Upon request, and for only those properties not eligible for mortgage insurance, Field Office staff shall notify participating agencies of properties in these areas as they become available prior to public listing.

Agencies interested in the same area must receive property lists at the same time, based on intervals agreed upon between HUD and the purchasers. Properties will be sold on a first come-first served basis as determined by HUD's receipt of a signed sales contract.

2. Agency Notification Procedures

Nonprofits and public agencies participating in this program must notify HUD of preliminary interest in specific properties within 5 days of HUD's notification. In the interest of time, participating

agencies are encouraged, but not required, to transmit their property interest via facsimile where feasible.

(If HUD notification is by mail, this 5 days will begin to run 5 days after mailing.) Those properties in which purchasers express an interest will be held off market for a 10 day consideration and inspection period. Other properties on the list will continue to be processed for public sale. At the end of the 10 day consideration and inspection period, properties for which no nonprofit or public agency has expressed a specific intent to purchase will be offered for sale under the competitive bid process. Properties in which an agency buyer has expressed an intent to purchase will continue to be held off market for up to 10 additional days pending receipt of the sales contract.

3. Unsold Properties

If properties in this category are not purchased by a nonprofit organization or government entity within the allotted time, they shall then be offered on a 10-day competitive bid period to individuals who will occupy them as their primary residences, or to the general public (also subject to a 10-day competitive bid period), with a priority period for the aforementioned individuals. (See Attachment 2.)

H. Sales to General Public

Properties which remain unsold after progressing through the steps described in F. and G. are then offered to the general public under a competitive bidding process.

1. Unless conditions have changed which affect the previously established price or terms, properties shall be offered at the same listing price. If

conditions dictate, a new listing price may be established, using current pricing procedures.

2. Insurable properties (See F. above) have been through a competitive bidding process and will, therefore, be offered under an extended listing basis unless the listing price is changed, thus necessitating a new 10-day competitive bid period.

3. Nonprofits and government agencies which purchase competitively during this period, and are the successful bidder without any discount being considered, then will be given the applicable discount off the gross sales price for that property. Such sales at the 30 percent discount are also subject to the resale restrictions described in Section J. (See Attachment 6 for specific instructions related to SAMS.)

4. Unsold properties are to be reanalyzed regularly, at least approximately every 30 days, to determine the cause(s) for lack of sales offers. Where warranted, prices may be adjusted in accordance with current procedures.

5. In any competitive bidding process, offers will continue to be accepted on the basis of the highest net return. In the event of identical tie net bids involving an owner-occupant buyer, the contract, provided it is otherwise acceptable, shall be awarded to the owner-occupant buyer. Tie net bids not involving an owner-occupant buyer, or two owner-occupant buyers, shall be determined by a drawing of lots.

I. Discount Levels

The amount of the discount on sales to nonprofits and government agencies will vary depending on the location of the property being sold, the type of sale, and the number of properties purchased and closed

in a single transaction. Homeless providers who wish to purchase a HUD owned property, including properties currently leased, must also receive the appropriate discount as described below.

1. Revitalization Areas

For insurable properties, the discount shall be 10 percent; 15 percent if five or more properties are purchased and closed in a single transaction. For uninsurable properties, the discount shall be 30 percent.

2. Non-Revitalization Areas

For insurable and uninsurable properties, the discount shall be 10 percent; 15 percent if five or more properties are purchased and closed in a single transaction.

3. Exception Properties

By definition, properties which are sold under the exception provision of D. above are not eligible for mortgage insurance. The discount on such properties is 30 percent.

4. Sales Commission/Closing/Financing Costs

Usually no real estate broker will be used, and no sales commission or closing/financing costs paid on these transactions. However, occasionally, a nonprofit or government agency may elect to use a broker in order to facilitate identification of HUD-owned properties suitable for a particular program, or request that HUD pay a dollar amount towards closing or financing costs. In this instance, any applicable discount applied at closing will be minus the full sales commission and/or the closing-financing costs claimed on the Sales Contract.

J. Financing

In the future, HUD may offer seller financing (purchase money mortgages/PMMs) to nonprofits

and government agencies with a five year term at 85 percent of purchase price with principal and interest calculated on a 30 year basis. While PMMs are not authorized for use at this time, instructions for implementing this incentive are in Attachment 4. Meanwhile, Field Office staff should make available information about other HUD programs which provide funding for acquisition and rehabilitation of single family properties. These programs include: HOPE 3, HOME, CDBG, Section 108 Loan Guarantees, and the 203(k) Rehabilitation Home Mortgage Insurance Program. If the Field Office is not co-located with Community Planning and Development, the Director of Housing Management must ensure that printed materials describing the relevant program options are on hand for distribution, and refer inquiries to CPD staff when appropriate.

K. Resale Restrictions on Properties Sold at 30 Percent Discount

It is expected that properties purchased from HUD at a 30 percent discount will be kept affordable to the income level of the targeted buyers.

1. Properties are primarily intended to be resold to persons who are at or below 115 percent of median income for their area, when adjusted for family size, or used to shelter the homeless.

2. Properties may not be resold to an investor within one year of HUD's closing. Individual exceptions may be granted by the Director of Housing Management in unusual circumstances. A request for such an exception must be made in writing to the local HUD Office with reasons given for needing the exception. (Longer resale

restrictions may apply depending on the source of acquisition and/or rehabilitation financing used.)

3. Without a specific written exception being granted by the Field Office, on an individual property basis, properties may not be occupied by, or resold to, any of the purchaser's officers, directors, elected or appointed officials, or employees, or the spouse, child, stepchild, parent, stepparent, or business associate of any of the above.

4. Notwithstanding the above, it is reasonable to expect that a nonprofit sponsor, like any housing developer, is entitled to a fee which covers costs. This fee should include overhead and staffing related to the project. Some fluctuation in the developer's fee is to be expected, however, as a general rule it is not anticipated that a nonprofit should realize more than a six to 10 percent rate of return on HUD properties purchased at the 30 percent discount, except where a higher rate is otherwise authorized by another HUD program.

NOTE: Attachment 5 is a sample Land Use Restriction Addendum which may be added to certain sales contracts executed with nonprofits and government agencies at the option of the Field Office. It is designed to limit profit according to the above and to ensure that the appropriate targeted population ultimately benefits. It is not required, or recommended, for application in all sales to nonprofits and government agencies, but should be used when the Director of Housing Management, in consultation with Field Counsel, has reason to believe it appropriate. If resale restrictions do not survive HUD's closing in your State, Field Counsel may wish to consider placing the addendum in a separate contract to be signed at the closing.

L. Other Key Features

1. Program Monitoring/Remedies for Abuse

a. Investor Buyers. SAMS has been modified to record the Social Security Number (SSN) of individual buyers so that investors may not represent themselves as owner-occupants with impunity. This number is already being collected on the Form HUD 9548, Sales Contract, approved by OMB for use through September 30, 1995. Chief Property Officers must now ensure that it is entered on the Sales Contract and then into SAMS on the Sales Offer Accepted screen (CM-DS-OA). SAMS II will allow the user to compare the SSN of a buyer with all previous buyers in a given period within a Field Office jurisdiction. When a Field Office learns of alleged falsification of the sales documents, it should refer the matter to the Inspector General for possible investigation. Consideration should also be given, in consultation with local HUD counsel, to a Limited Denial of Participation.

b. Nonprofit/Government Agency Buyer. When a Field Office identifies a program abuse by a buyer in this category, it should consider one or a combination of the following: application of the Land Use Restriction Addendum (Attachment 5) to any future sales contracts; in consultation with local HUD counsel, a Limited Denial of Participation; and referral of the matter to the Inspector General for further investigation.

Written notice of any potential adverse action must be given to the buyer, clearly stating HUD's reasons, and the buyer must be afforded an opportunity to respond in writing before any further action is taken. HUD may also limit the number of properties held for a purchaser, based upon the

purchaser's financial capacity as determined by HUD, and upon past performance in HUD programs.

2. Advertising and Outreach

Letters explaining these changes to the SFPD Sales Program should be sent to all brokers and participating nonprofits and government agencies by each Field Office within 30 days of receiving this Notice. Where feasible, outreach sessions should also be offered in order to answer questions and provide technical assistance to program users needing it.

3. Agency Reporting

Nonprofits which have purchased in the SFPD Sales Program at the 30 percent discount level should be asked to submit a letter to the Director of Housing Management by December 31, 1994, and annually thereafter, giving basic information about their program accomplishments over the past year. Contents of this letter should include the number of properties acquired from HUD at the 30 percent discount during the previous Fiscal Year, and, for each property resold in that period, by address, its acquisition cost, rehabilitation cost, and resale price. In addition, the letter should contain an overview of other program costs, including any developer's fee applied, and certify that resale buyers were at or below 115 percent of median income for their area when adjusted for family size. The letter must be signed by the Executive Director of the nonprofit, or the staff person with chief operating responsibilities.

If this report is not received within 30 days of its due date, the agency should be denied further participation in the deep discount program until it is received, and found acceptable to HUD.

Participating units of government should also provide this letter unless its contents would duplicate information already collected by other HUD program submissions. Nonprofits submitting this information under requirements of another HUD program need not duplicate their efforts either. For example, HOPE 3 grant recipients, which are required to submit Annual Performance Reports to CPD, will not also be required to submit an annual letter to the Director of Housing Management.

4. Direct Sales to HUD Tenants
[deleted as not relevant to this petition]

5. Leases to Homeless Providers
[deleted as not relevant to this petition]

M. Other Regulatory Changes
[deleted as not relevant to this petition

3. Competitive Sales Procedure

Properties are sold to the general public on a competitive bid basis through local real estate brokers except where direct sales procedures are appropriate to governmental entities, nonprofits, displaced persons, and HUD tenants in occupancy. If a property fails to generate an acceptable offer during the bidding period, it will remain on the market for an extended listing period. If it remains unsold and its price or terms are changed, the property will be subject to another competitive bidding period.

4. Direct Sales to Other Individuals or Entities

A direct sale may be made to an individual or entity that does not meet any of the categories mentioned in 3. above if a finding is made in writing by the Assistant Secretary for Housing-Federal Housing Commissioner, or his or her designee, that such a sale would further the goals of the National

Housing Act and be in the best interests of the Secretary.

5. Earnest Money Deposits

[deleted as not relevant to this petition]

6. Conveyance of Occupied Properties in Those Instances Where it is in HUD's Best Interest Due to Excessive Eviction or Relocation Expenses Required by local Law

Although infrequent, there are instances where excessive eviction and/or relocation expenses must be paid by mortgagees and reimbursed by the Department in the claim for insurance benefits. In the interest of cost effectiveness, where a State or local law requires the payment of high eviction costs or excessive relocation expenses as part of the eviction process, Field Offices will determine whether to accept a property occupied, without requiring that all other eligibility criteria, except for habitability, be met by the remaining occupants, rather than incur the excessive costs that would be generated by an eviction.

Any questions regarding this Notice may be directed to the Single Family Property Disposition Division at (202) 708-0740 or 708-1832.

_____

Assistant Secretary for Housing
- Federal Housing commissioner

Attachments

ATTACHMENT 1: PREQUALIFICATION STANDARDS FOR NONPROFITS TO PARTICIPATE IN THE SFPD DISCOUNT SALES PROGRAM

Field Office Housing staff is responsible for pre-qualifying nonprofit organizations to participate in the SFPD discount sales program, unless Field Office CPD staff agrees to accept this responsibility, or unless they have been previously qualified by participation in another HUD program. To participate, a nonprofit must meet the following standards:

1 Provide a list of all Board members, including names and titles;

2. Provide evidence of the IRS ruling granting tax exempt status under 501(c) of the Internal Revenue Code of 1986, as amended;

3. Provide a certification signed by an authorized representative of the organization in the following format that the organization has a voluntary Board of Directors:

Recommended form of certification:

(Name of Organization) certifies that the members of its Board of Directors serve in a voluntary capacity and receive no compensation, other than reimbursement for expenses, for their services and the nonprofit organization operates in a manner so that no part of its net earnings inures to the benefit of any individual, corporation, or other entity.

Print authorized representative's name

Signature Date Title

4. Provide evidence of the administrative capability of the applicant to develop and carry out the proposed homeownership program in a reasonable time and a successful manner. Include in this discussion the past experience of the applicant, if any, in acquisition, rehabilitation, counseling and training, and/or managing homeownership program or other affordable housing programs.

5. Provide evidence of the capability of the applicant to handle financial resources, including any prior relevant financial management experience.

6. Describe any unresolved serious problems, or any outstanding audit findings, involving the applicant and describe how these problems are being resolved.

7. If possible, submit the auditor's summary of a certified independent audit report covering the applicant's activities prepared within the last two years. If none is available, provide a certification of adequacy of the applicant's internal management controls from an independent certified public account who has examined the current internal management controls, or is establishing those systems for a new entity.

Mortgagee Letter 2001-30

U. S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

DEC 31 2001

OFFICE OF THE ASSISTANT SECRETARY FOR HOUSING-FEDERAL HOUSING COMMISSIONER
MORTGAGEE LETTER 2001-30

TO: ALL APPROVED MORTGAGEES
ALL APPROVED NONPROFIT ORGANIZATIONS
ALL PARTICIPATING GOVERNMENT ENTITIES

SUBJECT: Nonprofit Organization and Government Entity Participation in Single Family FHA Activities: Clarification of Net Development Cost Calculation; Expansion of the Use of the Net Development Cost Calculation and Land Use Restriction Addendum to Properties Sold at a Discount of 10 percent or more; Program Definitions; and List of Relevant Documents

This Mortgagee Letter clarifies the calculation of Net Development Cost and expands the use of the Net Development Cost calculation to HUD properties sold at a discount of 10 percent or more. It applies to government entities and qualified nonprofit organizations that have been pre-approved by HUD to purchase HUD Homes (also referred to as Real Estate Owned, or REO properties in other

Mortgagee Letters). Nonprofit organizations and government entities must pass on the discount received from HUD to increase homeownership opportunities for low- and moderate-income families and individuals. Appendix A to this Mortgagee Letter provides a detailed list of the costs allowed in the Net Development Cost calculation.

This Mortgagee Letter also expands the use of the Land Use Restriction Addendum to all HUD homes sold to nonprofit organizations and government entities at a discount of 10 percent or greater, effective for all sale contracts executed on or after one month from the date of this Mortgagee Letter. The addendum, to be attached to all Sales Contracts for these discounted properties, stipulates that the property be utilized to expand affordable housing opportunities as stated in 24 CFR 291.301(3). The Land Use Restriction Addendum is set forth in Appendix B to this Mortgagee Letter. Discounted homes purchased through the Dollar Homes, Asset Control Area (ACA), and Officer/Teacher Next Door programs continue to be exempt from these restrictions.

Appendix C to this Mortgagee Letter is a list of definitions for terms commonly used by lenders, nonprofit organizations, and government entities in FHA Single Family Housing programs and Appendix D to this Mortgagee Letter is a summary reference guide of HUD Handbooks, Mortgagee Letters, and Housing Notices that apply to nonprofit participation in Single Family Housing activities.

Questions regarding this Mortgagee Letter should be directed to the FHA Homeownership Centers in Atlanta (1-888-696-4687), Denver (1-800-543-9378), Philadelphia (1-800-440-8647) or Santa Ana (1-888-827-5605).

Sincerely,
John C. Weicher
Assistant Secretary for Housing-
Federal Housing Commissioner

Attachments

Appendix C [to Mortgagee Letter 2001-30]

Definitions

This list of definitions applies to terminology only as applied to FHA's Single Family Housing Nonprofit Programs.

203(b) - An FHA mortgage insured under Section 203(b) of the National Housing Act for the acquisition of a 1-4 unit property by an owner occupant buyer, a qualified nonprofit organization that has been pre-approved to participate by HUD, or a participating government entity.

203(k) - An FHA mortgage insured under Section 203(k) of the National Housing Act. This mortgage is for the acquisition and rehabilitation of a 1-4 unit property by an owner occupant buyer, a qualified nonprofit organization that has been pre-approved to participate by HUD, or a participating government entity.

203(k) Consultant - A technical expert, selected by the mortgagee from FHA's roster of qualified 203(k) consultants to assist mortgagors for a fee with the preparation of the rehabilitation plan for a property being financed with HUD's 203(k) Rehabilitation Insured Mortgage. A 203(k) Consultant may also perform draw inspections. The mortgagor, and not HUD or the mortgagee, is responsible for paying the fees charged by the 203(k) consultant. See Mortgagee Letter 94-11 for a description of the 203(k) Consultant's role. See Mortgagee Letter 95-40 for the maximum allowable fees that a 203(k) Consultant can charge. See Mortgagee Letter 00-25

for a description of how individuals can apply for placement on FHA's roster of qualified 203(k) consultants.

Affordable Housing Program - A program, as described in a written proposal submitted to HUD, operated by a nonprofit in specific geographical areas in which the nonprofit provides affordable homeownership opportunities for low-to-moderate income buyers by purchasing, rehabilitating, and reselling HUD Homes to these buyers. The program can include other homeownership activities, such as counseling. See Mortgagee Letter 2002-01, Attachment 2, for a description of the items that a nonprofit should address in the written proposal that describes its program.

Allowable Net Development Cost - Costs that are permitted to be included in the Net Development Cost calculation.

Conflict of Interest - An inappropriate relationship that compromises the private interests and official responsibilities of a person in a position of trust. It is a conflict of interest for a nonprofit to employ staff who also work for and receive financial benefits from a for-profit entity that is providing the nonprofit with services related to the nonprofit's affordable housing plan. Board members must serve on a voluntary basis, and may not be paid nor receive any compensation for any services they provide in the implementation of the nonprofit's affordable housing program.

[balance of this attachment deleted as not relevant]

HUD Form 9548 Sales Contract

1. I (We), _____ (Purchaser(s)) agree to purchase on the terms set forth herein, the following property, as more particularly described in the deed conveying the property to the Secretary of Housing and Urban Development: (enter street number, street name, unit number, if applicable, city, county, State).
2. The Secretary of Housing and Urban Development (Seller) agrees to sell the property at the price and terms set forth herein, and to prepare a deed containing a covenant which warrants against the acts of the Seller and all claiming by, through or under him. Title will be taken in the following name(s) and style: (enter name)
3. The agreed purchase price of the property is: (enter price). Purchaser has paid $___ as earnest money to be applied on the purchase price, and agrees to pay the balance of the purchase price, plus or minus prorations, at the time of closing, in cash to Seller. The earnest money deposit shall be held by (enter name).
4. ( ) Purchaser is applying for FHA insured financing (( ) 203(b), ( ) 203(b) repair escrow, ( ) 203(k) with a cash down payment of $___ due at closing and the balance secured by a mortgage in the amount of $___ for ___ months (does not include FHA Mortgage Insurance Premium, prepaid expenses or closing costs Seller has agreed to fund into mortgage.). ( ) Said mortgage involves a repair escrow amounting to $___. [or] *( ) Purchaser is paying cash or applying for conventional or other financing not involving FHA.* (emphasis added)

5. Seller will pay reasonable and customary costs, but not more than actual costs, nor more than paid by a typical Seller.
6. (a) Upon sales closing, Seller agrees to pay to the broker identified below a commission (including selling bonus, offered by Seller) of $_____. (b) If broker identified below is not the broad listing broker, broad listing broker will receive a commission of $___.
7. The net amount due Seller is (Purchase price (Item 3) less Items 5 and 6): $____
8. Purchaser is ( ) owner-occupant (will occupy this property as primary residence); ( ) investor; ( ) nonprofit organization; ( ) public housing agency; ( ) other government agency. Discount at closing: ____%. Discount will reduced by amounts, if any, listed on Line Items 5 and 6.
9. Time is of the essence as to closing. The sale shall close not later than ___ days from Seller's acceptance of contract. Closing shall be held at the office of Seller's designated closing agent or _____.
10. If Seller does not accept this offer, Seller ( ) may ( ) may not hold such offer as a back-up to accepted offer.
11. [not relevant to this petition]
12. Should Purchaser refuse or otherwise fail to perform in accordance with this contract, including the time limitation, Seller may, at Seller's sole option, retain all or a portion of the deposit as liquidated damages. The Seller reserves the right to apply the earnest money, or any portion thereof, to any sums which may be owed by the Purchaser to the Seller for rent. Purchaser(s) initials: ____ Seller's initials: ___

13. This contract is subject to the Conditions of Sale on the reverse hereof, which are incorporated herein and made part of this contract.

[balance of first page are signature spaces and not reprinted here]

[on reverse of first page] Conditions of Sale

A. All assessments, including improvement assessments which are available for payment without interest or penalty for advance payment, taxes, rent, and ground rent, if any, shall be prorated as of the closing date.

B. [bold in original] **Seller makes no representations or warranties concerning the condition of the property, including but not limited to mechanical systems, dry basement, foundation, structural, or compliance with code, zoning or building requirements and will make no repairs to the property after execution of this contract. Purchaser understands that regardless of whether the property is being financed with an FHA-insured mortgage, Seller does not guarantee or warrant that the property is free of visible or hidden structural defects, termite damage, lead-based paint, or any other condition that may render the property uninhabitable or otherwise unusable. Purchaser acknowledges responsibility for taking such action as it believes necessary to satisfy itself that the property is in a condition acceptable to it, of laws, regulations and ordinances affecting the property, and agrees to accept the property in the condition existing on the**

date of this contract. It is important for Purchaser to have a home inspection performed on the property in order to identify any possible defects. If FHA insured financing is used, up to $200 of the cost to perform the inspection may be financed into the mortgage. Names of home inspection companies can be found in the yellow pages of your telephone directory under the heading "Home Inspection Services."

C. [not relevant to this petition]

D. [not relevant to this petition]

E. [not relevant to this petition]

F. [not relevant to this petition]

G. [bold in original] **Purchaser understands that Seller's listing price is Seller's estimate of current fair market value.**

H. [not relevant to this petition]

I. [not relevant to this petition]

J. [not relevant to this petition]

K. The effective date of this contract is the date it is accepted (signed) by the Seller.

L. [not relevant to this petition]

M. [not relevant to this petition]

N. Seller makes no representations or guarantees that the property will, in the future, be eligible for FHA insured mortgage financing, regardless of its condition or the repairs which may be made.

O. [not relevant to this petition]

P. *This contract contains the final and entire agreement between Purchaser and Seller and they shall not be bound by any terms, conditions, statement, or representations, oral or written, not contained in this contract.* (emphasis added).

Pre-Sentence Report

[relevant paragraphs from Pre-Sentence Report, emphasis added]:

16. Both Hildenbrand and Stone agreed in their Factual Resumes that *the amount set forth in the Indictment and Factual Resume, $228,400, is the true loss amount* related to their criminal conduct. This figure represents the amount of funds illegally taken from CHF by Hildenbrand and Stone. There were two forms of improper payments by CHF to RCI, all of *which totaled $228,400*: (1) payments made after a house has been marked "final" in CHF's records, and (2) payments made to RCI for houses in Florida with which Stone had no connection. *According to the agents in this case, this is the loss amount for their counts of conviction and includes all relevant conduct.*

18. According to AUSA Gill, Agent Mercer, and Auditor Howell, the amount of the arbitration, $544,500, was not included as part of the stolen funds from CHF, because it could not be proven that the defendants took the money, as they had the $228,400; (1) payments made after a house has been marked "final" in CHF's records, and (2) payments made to RCI for houses in Florida with which Stone had no connection. Therefore, the *total intended loss* amount to be used in the computation of the guidelines that was reasonably foreseeable and jointly undertaken by Hildenbrand and Stone *was $228,400.*

27. The low income families, the prospective purchasers of the HUD homes, could be considered victims because, by the defendants increasing the

costs associated with the rehabilitation of the houses, through improper payments to RCI, Hildenbrand and Stone increased the ultimate price of the residences, making them less affordable to the low income purchasers of the residences, the intended beneficiaries of the program. *However, there are no identified victims and/or losses under this hypothesis.*

30. Therefore, the victim in this case is HUD, which, after discovering the offense, discontinued CHF from its SFAHP. Therefore, the loss amount is the total amount of the discounts offered to CHF toward its purchase price of the houses after the first overt act of the defendant. A loss amount to HUD has not been determined; however, once established by Forensic Auditor Howell, it will be submitted by way of an Addendum to the Presentence Report. Once a loss amount is determined, it is subject to the Mandatory Victim Restitution Act of 1996. Pursuant to 18 U.S.C. § 3664(f)(1)(A), the Court shall order restitution to each victim in the full amount of each victim's losses as determined by the Court and without consideration of the economic circumstances of the defendant.